

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs February 25, 2009

STATE OF TENNESSEE v. CORA NEUMA FIERBAUGH

**Appeal from the Circuit Court for Sevier County
No. 12271-III Rex Henry Ogle, Judge**

No. E2008-00707-CCA-R3-CD - Filed June 12, 2009

The defendant, Cora Neuma Fierbaugh, pled guilty to reckless endangerment, a Class E felony, evading arrest, a Class E felony, driving on a suspended license, a Class B misdemeanor, leaving the scene of an accident, a Class C misdemeanor, and violation of the registration law, a Class C misdemeanor. The trial court denied judicial diversion and imposed two-year sentences for the felony convictions, a six-month sentence for the Class B misdemeanor conviction, and thirty-day sentences for the Class C misdemeanor convictions. The sentences were imposed to run concurrently, for an effective two-year sentence, which the trial court ordered to be served with sixty days in jail and the balance on probation. In this appeal, the defendant raises two issues: (1) whether the trial court erred by denying the defendant's application for judicial diversion and (2) whether the trial court erred by imposing confinement. We affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and D. KELLY THOMAS, JR., JJ., joined.

J. Liddell Kirk, Knoxville, Tennessee (on appeal); and Mitchell T. Harper, Knoxville, Tennessee (at trial), for the appellant, Cora Neuma Fierbaugh.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; James B. Dunn, District Attorney General; and Emily Faye Abbott, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The transcript of the guilty plea hearing is not part of the record. However, at the sentencing hearing, the State read the following recitation of facts:

While on patrol in Gatlinburg on September 8, 2006 and September 9, 2006, we were dispatched to the Riverside Motel on the Parkway on an accident dispute. Purportedly a lady in a green Ford

Taurus had rammed a wrecker and left the scene. As I pulled up, the Taurus had bolted across the southbound lanes into traffic causing traffic to bow up and the car continued morphing. The vehicle sped up and was swerving from lane to lane through traffic, then abruptly went through traffic on the wrong side all the while not giving into the blue lights and sirens behind her she got faster. In an attempt to [elude] the police, she jerked her vehicle over to go up Cherokee Orchard Road and there were pedestrians in the crosswalk which she almost hit. She jerked her car back over and entered Cherokee Orchard in the opposite lane and headed east in a westbound lane of traffic. She made it through the intersection without hitting anyone and took off again at a high rate of speed, all the while we were in pursuit. All of a sudden she abruptly bowed up in the middle of the road and suddenly bolted from the vehicle refusing to follow commands to stop and stand still. She continued to not follow directions and would not stop talking. She refused to produce a driver's license. Later a Tennessee I. D. was found in her possession with her name and date of birth and it revealed a suspended driver's license. She had the wrong license plate displayed on her vehicle. She was very argumentative and uncooperative. Due to all circumstances she was charged with the following: Evading arrest, violation of registration, leaving the scene of an accident, driving on suspended license, reckless endangerment and the subject had not been drinking.

The defendant's statement of the facts came from the presentence report, which was received as an exhibit at the sentencing hearing:

I had parked my car in a parking lot that I thought belonged to the shop that I went into. When I came out . . . they were in the process of towing my car, they only had the chains hooked up. I paid the bill but the wrecker owner and the lady who called the wrecker service would not let me leave. The wrecker owner refused to move and lady was yelling "Don't let her leave, back up and block her car." I got into my car and the wrecker back[ed] up and hit my car. It did not damage the wrecker, but it did damage my car. The wrecker driver got into his truck and moved forward and I pulled out to get away from them. I had food [poisoning] and was on medication at this time and was not feeling well. The lady from the parking lot was angry and yelling. I became frightened because of her behavior. She jumped in front of my car and decided that was not smart and jumped away as I was trying to get out. I realized I was being chased by the police and became confused because I did not know why I was being chased. I pulled over on a side street to get away from the lady and the wrecker man. I was not trying to run from the police.

The presentence report also reflects that the defendant had a bachelor's degree in education but had not worked in ten years due to health issues. The defendant reported that she lived with her mother, who supported her, and that she planned to apply for disability. The record reflects that the defendant had prior traffic-related convictions for driving without proper registration and speeding.

At the sentencing hearing, the State offered only the presentence report as evidence. The defendant did not testify or offer other proof.

On appeal, the defendant challenges the trial court's denial of judicial diversion. She also challenges the manner of service of her sentence. However, we are foreclosed from conducting a review on the merits due to the absence of the transcript of the guilty plea hearing from the appellate record.

The defendant has "a duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues forming the basis of the appeal." State v. Ballard, 855 S.W.2d 557, 560 (Tenn. 1993) (citing State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983)). "Where the record is incomplete and does not contain a transcript of the proceedings relevant to an issue presented for review, or portions of the record upon which the party relies, an appellate court is precluded from considering the issue." State v. Ballard, 855 S.W.2d at 560-61 (citing State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988)). Also, our de novo review on the record of sentencing issues requires us to consider evidence presented at a guilty plea hearing. See T.C.A. §§ 40-35-210(b)(1), -401(d). Because the evidence, if any, presented at the guilty plea hearing is not before this court, we must presume the trial court's determinations were correct. See Roberts, 755 S.W.2d at 836; State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991). The defendant is not entitled to relief.

In consideration of the foregoing and the record as a whole, the judgments of the trial court are affirmed.

JOSEPH M. TIPTON, PRESIDING JUDGE